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In the
Supreme Court of the United States

ERIC ELDRED, ET. AL.,
Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INTELLECTUAL PROPERTY LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

This brief *amici curiae* in support of petitioners is submitted pursuant to Rule 37 of the Rules of this Court. Counsel for petitioner and respondent have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

Amici are 53 law professors who teach and research intellectual property law at American universities; a complete list of amici is set forth in an appendix to this brief. In their capacity as educators, amici write books and articles protected by copyright. They also make extensive use both of copyright-protected works and of works in the public domain. Amici are deeply concerned with the integrity of copyright law and with the constitutional goals of promoting authorship and innovation and of encouraging the broad dissemination of works of authorship. Amici seek to ensure that Congress grants rights to copyright owners in a manner that is consistent, rather than in conflict, with those goals.

Amici are in particular concerned about the recent, rapid expansion of copyright scope and duration, at the expense of the public domain. This expansion threatens to distort the balance between incentives and public access embodied in the Copyright and Patent Clause.

INTRODUCTION

In 1888, the British author Herbert G. Wells wrote and published "The Time Traveler," a short story about a time machine. In 1895, he published *The Time Machine* as his first novel. *The Time Machine* was a critical and popular

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[1] No counsel for a party authored this brief in whole or part. The Willard Pedrick Distinguished Research Scholar Fund of the Arizona State University Foundation, at the direction of amicus Dennis S. Karjala, made a monetary contribution to defray the costs of printing the brief.

success, bringing Wells fame, and enough money to quit his job as a biology teacher and devote himself to writing full-time.[2] Wells went on to write and publish thirteen further novels and numerous short stories. He died in 1946. The copyright in *The Time Machine* was registered in the United States in 1895, and renewed in 1923. The novel entered the public domain in 1951. Since that date, it has been continuously in print. Later authors have adapted *The Time Machine* in a variety of formats, including sequels,[3] films,[4] comic books,[5] musicals,[6] a ballet,[7] and a video game.[8] Since 1992, the full text of *The Time Machine* has been available on the Internet via Project Gutenberg.[9] In Europe, *The Time Machine* is still protected by copyright. It will not enter the public domain until 2016 – 70 years following Wells's death. In Europe, these works could not have been created at all unless their authors had secured a license from Wells's estate.

Wells's 1933 novel *The Shape of Things to Come* will also enter the public domain in Europe in 2016. In the

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[2] See Michael Foot, *H.G.: The History of Mr. Wells* 29-35 (1995).

[3] See Stephen Baxter, *The Time Ships* (1995); Egon Friedell, *The Return Of The Time Machine* (1972); K.W. Jeter, *Morlock Night* (1979); David Lake, *The Man Who Loved Morlocks* (1981); George Pal & Joe Morhaim, *Time Machine II* (1981).

[4] See *The Time Machine* (2001); *Time After Time* (1979); *The Time Machine* (1978); *The Time Machine* (1960); *The Time Machine: The Journey Back* (1993).

[5] See H.G. Wells, *The Time Machine* (Classics Illustrated #133 1956); H.G. Wells, *The Time Machine* (Dell Comics 1960); Otto Binder, *The Time Machine* (Marvel Classics Comics #2 1976); Geoff Johns, *The Morlocks* (Marvel Comics 2002).

[6] See Jerry Flattum, *Time Travelers* (1980); R. Wright Campbell & Brian Bennett, *The Time Machine: a musical play in 2 acts* (1981).

[7] Christopher Stone, *The Time Machine Ballet* (1982)

[8] See *The New Adventures of The Time Machine* (Dreamcatcher Interactive, Inc. 2002).

[9] See URL: http://sailor.gutenberg.org/etext92/timem11.txt.

United States, however, the copyright in *The Shape of Things to Come*, originally scheduled to expire in 1989, was extended for an additional nineteen years by the 1976 Copyright Act, and extended again for another 20 years by the Sonny Bono Copyright Term Extension Act. The copyright in *The Shape of Things to Come* will endure in the United States until 2028 – twelve years after the novel enters the public domain in Europe. In the United States, *The Shape of Things to Come* is out of print.

BACKGROUND: THE LEGISLATIVE HISTORY OF THE COPYRIGHT TERM EXTENSION ACT

The Sonny Bono Copyright Term Extension Act [CTEA][10] added an additional 20 years to the terms of U.S. copyrights, both prospectively, for works not yet created, and retrospectively, for works already protected by copyright at the time the CTEA took effect. The sequence of events leading to the enactment of the CTEA began with the European Union's adoption of the *Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights*. The EU Directive harmonized the copyright terms of EU member states by requiring states to extend their copyright terms to match the longest terms granted by any member. United States copyright owners urged Congress to follow suit.

In the same year, the U.S. Copyright Office announced that it would hold a hearing on copyright duration. See 58 Fed. Reg. 40838 (1993). At that hearing, according to the Register of Copyrights, "[p]erhaps because legislation did not appear on the horizon, only representatives who strongly supported increasing the term of protection appeared. They represented lyricists and composers, music publishers, and the motion picture

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[10] Pub. L. No. 105-298, 112 Stat. 2827 (1998).

industry."[11] Composers, music publishers, and film studios continued to lobby strongly for copyright term extension.[12] They argued that because European nations would apply the "rule of the shorter term," works originating in the U.S. would be protected in Europe only until their U.S. copyrights expired. To take advantage of the increased copyright term in Europe and the royalty payments that increase might generate, they contended, the United States would need to increase the term of its copyrights to match Europe's.[13]

In 1995, Representative Moorhead introduced H.R. 989, the "Copyright Term Extension Act of 1995." Senator Hatch introduced a companion bill, S. 483, in the Senate. Both bills would have amended the copyright law by extending copyright terms for all works by an additional 20 years.[14] At the House and Senate hearings, witnesses testified about the benefits that would flow from harmonizing copyright duration in a global market, and the trade advantages associated with increasing the copyright term to take advantage of the lengthened E.U. term.[15] A parade of composers,[16] composers' children,[17]

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[11] See *Copyright Term Extension Act of 1995, Hearing on S. 483 Before the Senate Judiciary Committee*, 104th Cong., 1st Sess. 14 (1997) (prepared statement of MaryBeth Peters, Register of Copyrights) [hereinafter *1995 Senate Hearing*].

[12] See Seth Goldstein, *Is End Near For Films in Public Domain?*, Billboard, Jan. 15, 1994, at 6.

[13] See *1995 Senate Hearing* at 20-21(prepared statement of MaryBeth Peters, Register of Copyrights).

[14] H.R. 989, 104th Cong., 1st Sess. (1995); S. 483, 104th Cong., 1st Sess. (1995).

[15] See, e.g., *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 205 (1996) (testimony of Charlene Barshefsky, Deputy U.S.Trade Representative) [hereinafter *1995 House Hearing*]; *1995 Senate Hearing* at 23 (testimony of Bruce Lehman, Commissioner of Patents); *id.* at 137 (prepared statement of American Society of Composers, Authors and Publishers):

> Mr. Chairman, it comes down to this: we can obtain 20 years of continued trade surplus for American creativity in the European market at no cost to ourselves, simply by enacting your legislation. If we fail to act promptly, many great American creative properties will cease to generate revenues abroad for an additional 20 years.

[16] See, e.g., *1995 Senate Hearing* at 43-46 (1997) (testimony of Alan Menken); see also *id.* at 58-59 (prepared statement of Ginny Mancini, widow of composer Henry Mancini).

[17] See, e.g., *1995 House Hearing* at 268 (written testimony of Marsha Durham, daughter of composer Eddie Durham); *id.* at 272 (written testimony of Mary Ellin Barlett, daughter of composer Irving Berlin); see also *1995 Senate Hearing* at 64-65 (prepared statement of Shana Alexander, author and daughter of composer Milton Ager):

> [I]t appears to me monstrously unfair that other recognized forms of property -- lands, businesses, and so on--can be handed down indefinitely, so long as proper taxes are paid, whereas the value of intellectual property under our present copyright laws arbitrarily is cut off 75 years after it was created.

and composers' grandchildren[18] presented testimony urging Congress to enact a 20-year extension to prevent the expiration of their copyrights.[19]

As Register Peters's testimony before the Senate Judiciary Committee made clear, though, the bills would not in fact have harmonized U.S. copyright terms to

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[18] See *1995 House Hearing* at 264 (prepared statement of E. Randol Schoenberg, grandson of Arnold Schoenberg).

[19] The Senate committee reported S. 483 favorably with two amendments; neither one significantly affected the legislation's failure to harmonize copyright terms. S. Rep. No. 315, 104th Cong. 2d Sess. (1996). The bills did not reach a vote, and were reintroduced in the 105th Congress. See Copyright Term Extension Act of 1997, H.R. 604, 105th Cong., 1st Sess. (1997); Copyright Term Extension Act of 1997, S. 505, 105th Cong., 1st Sess. (1997).

Europe's.[20] Further, no witness and no member of Congress expressed concern that the extant term of copyright protection was inadequate to encourage authors to create and distribute new works of authorship. On the contrary, witnesses, Senators, and Representatives praised the unparalleled success of the U.S. copyright system, which had made the U.S. the world leader in the production and marketing of copyrighted works.[21] No witness or member of Congress suggested that circumstance or government action had prevented copyright owners from exploiting their works to the fullest extent during the copyright terms they had already enjoyed.[22] Instead, witnesses and members of Congress argued that fairness required U.S. copyrights to last for the lives of the author and two generations of descendants, as they now would in Europe.[23]

Congress passed the legislation, renamed the "Sonny Bono Copyright Term Extension Act," in October of 1998. The Act may, as its sponsors promised, "ensure that the United States will continue to receive the

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[20] *1995 Senate Hearing* at 11-22 (prepared statement of Marybeth Peters, Register of Copyrights). See also *1995 House Hearing* at 312 (1995) (testimony of Professor William Patry, Cardozo Law School). Professor Patry testified at length about H.R. 989's failure to harmonize U.S. copyright terms with the terms prescribed by the E.U. directive, and offered suggestions for amendments to solve some of the problems. Patry's suggestions received no serious consideration.

[21] See, e.g., *1995 Senate Hearing* at 1-4 (statement of Senator Hatch); *id.* at 40 (testimony of Jack Valenti, Motion Picture Association of America); *1995 House Hearing* at 1 (statement of Rep. Moorhead); *id.* at 205 (testimony of Ambassador Charlene Barshefsky, Deputy U.S. Trade Representative).

[22] Cf. Tyler Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyr. Soc'y USA 19, 107-09 (2002).

[23] See, e.g., *1995 Senate Hearing* at 1-4 (statement of Senator Hatch); *1995 House Hearing* at 268 (prepared statement of Marsha Durham, widow of Eddie Durham).

enormous export revenues that it does today from the sale of its copyrighted works abroad."[24] But it does not encourage authors to create new works of authorship, and it does not harmonize U.S. copyrights with Europe's.

Petitioners challenged the constitutionality of the CTEA under the Copyright and Patent Clause, art I, § 8, cl. 8, and the First Amendment. The Court of Appeals held that the initial language of the Copyright and Patent Clause, giving Congress "Power . . . To promote the Progress of Science and useful Arts," imposes no constraints whatsoever on Congress's authority to enact copyright laws. See *Eldred v. Reno*, 239 F.3d 372, 377-78 (D.C. Cir. 2001). It dismissed petitioners' First Amendment challenge on the ground that "copyrights are categorically immune from challenges under the First Amendment." *Id.* at 375-76.

SUMMARY OF ARGUMENT

The CTEA's extension of the terms of existing copyrights exceeds Congress's power under the Copyright and Patent Clause, for it advances no goal cognizable under that clause. The overriding goal of the CTEA was to extend the period in which copyright holders could control and collect royalties from their old copyrights; its constriction of the public domain carries with it none of the countervailing public benefits required by the Copyright and Patent Clause. In addition, both the CTEA's extension of existing copyright terms and its extension of copyright in works not yet created violate the First Amendment.

ARGUMENT

I. THE CTEA IS BEYOND CONGRESS'S POWER UNDER THE COPYRIGHT AND PATENT CLAUSE

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[24] Cong. Rec. H9950 (Oct. 7, 1998) (remarks of Rep. Coble).

A. CONGRESS HAS NO POWER TO ENACT LEGISLATION UNDER THE COPYRIGHT AND PATENT CLAUSE UNLESS THAT LEGISLATION PROMOTES "THE PROGRESS OF SCIENCE AND USEFUL ARTS," AND IT HAS NO POWER TO GRANT EXCLUSIVE RIGHTS THAT EXTEND BEYOND "LIMITED TIMES"

The Copyright Term Extension Act was enacted pursuant to Congress's power under the Copyright and Patent Clause. That clause vests Congress with power

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The Framers intended the Copyright and Patent Clause to give Congress the power to encourage the creation, broad dissemination, and widespread use of writings and inventions, by promising authors and inventors exclusive rights that would be limited in both scope and duration.[25] The promise of exclusive rights was designed to encourage authors to create and inventors to discover.[26] The restriction to limited times was designed to ensure that the public will have unrestricted access to and use of protected writings and inventions at the expiration of a short period of exclusivity.[27]

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[25] See *Twentieth Century Music v. Aiken*, 422 U.S. 151, 156 (1975); *Graham v. John Deere*, 383 U.S. 1, 5-6 (1966); *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Trade-Mark Cases*, 100 U.S. 82, 93-94 (1879).

[26] See *Feist Publications, Inc. v. Rural Telephone Service*, 499 U.S. 340 (1991); *Graham v. John Deere*, 383 U.S. 1, 9 (1966).

[27] See Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed too Long?,"* 52 Fla. L. Rev. 989 (2000); Richard Graves, *Private Rights, Public Uses and the Future of the Copyright Clause*, 80 Neb. L. Rev. 64 (2001); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119; Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 Harv. J. on Legis 45 (2000); Edward C Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. Intell. Prop. L. 315 (2000).

As the Court explained in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984):

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.[28]

The Framers' purpose in enacting the Copyright and Patent Clause is reflected in the specification of Congress's power as one "to promote the Progress of Science and useful Arts."[29] The D.C. Circuit, oddly, held that the clause's limitation of congressional power to enactments that "promote the Progress of Science and useful Arts" has no relevance to the scope of that power. *Eldred v. Reno*, 239 F.3d 372, 377-78 (D.C. Cir. 2001). That holding was fundamentally mistaken.

In *Graham v. John Deere*, 383 U.S. 1 (1966), a patent

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[28] See also *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994); *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349-350 (1991); *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151,156 (1975); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-8 (1932).

[29] See Margaret Chon, *Postmodern Progress: Reconsidering the Copyright and Patent Power*, 43 DePaul L. Rev. 97 (1993); Malla Pollack, *What is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing The Progress Clause*, 80 Neb. L. Rev. (forthcoming 2002).

case, the Court described the bargain the Copyright and Patent Clause embodies. The Copyright and Patent Clause, the Court warned, grants only "qualified authority," because Congress's power under the clause "is limited to the promotion of advances in the 'useful arts.'" *Id.* at 5. In exercising the art. 1, sec. 8, cl. 8 power, Congress "may not overreach the restraints imposed by the stated constitutional purpose." *Id.* at 6. Because the patent system "by constitutional command must 'promote the Progress of . . . useful Arts,'" Congress may not "enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby." *Id.* It may not "authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." *Id.* It may enact no rule conferring a patent monopoly unless the rule advances "[i]nnovation, advancement, and things which add to the sum of useful knowledge." This, the Court explained, "is the *standard* expressed in the Constitution and it may not be ignored." *Id.* (emphasis in original).

Even without regard to *Graham v. John Deere*, the D.C. Circuit's position is contrary to the constitutional language. It is well-settled that the constitutional language conferring a power on Congress constrains the scope of that power. That, after all, is the very purpose of the constitutional text. The "powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *United States v. Morrison*, 529 U.S. 598, 607-08 (2000) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)); see also, e.g., *Railway Labor Executives' Assn v. Gibbons*, 455 U.S. 457, 468, 471 (1982) (finding in the "language of the Bankruptcy Clause itself" an "affirmative limitation or

restriction upon Congress' power").[30] In this case, the text of Art. I, sec. 8, cl. 8 empowers Congress to enact statutes that "promote the Progress of Science and useful Arts," much as other clauses of Art. 1, sec. 8 empower Congress to enact statutes that "regulate Commerce . . . among the several States," or that "establish Post Offices and Post Roads." The authority to enact statutes that "promote the Progress of Science and useful Arts" is the *power* the constitutional text confers. If a statute does not "promote the Progress of Science and useful Arts," it is outside the scope of the constitutional grant.[31]

The Copyright and Patent Clause's second phrase, restricting authors' and inventors' exclusive rights to "limited Times," is just as crucial to the constitutional bargain. The "limited times" restriction encourages early and broad distribution of protected writings and inventions, both by inducing authors and inventors to exploit their monopoly rights fully during their short term rather than hoard them, and by ensuring that after a brief period of exclusivity, the public will be able to use, consume, distribute, improve and build on those writings and inventions without limitation. See, e.g., *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990). Authors and inventors

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[30] Similarly, the Court has made clear that "limitations on the commerce power are inherent in the very *language* of the Commerce Clause." *United States v. Lopez*, 514 U.S. 549, 553 (1995)(emphasis added); see also *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (Spending Cause); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (Fourteenth Amendment's Enforcement Clause).

[31] *Deep South Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972), is not to the contrary. That case stands for the unexceptional position that Congress, in exercising its authority to "promote the Progress of Science and useful Arts," may withhold some rights from copyright and patent holders. See *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 433 (1984). It nowhere suggests that Congress may enact statutes that do *not* "promote the Progress of Science and useful Arts."

build on the work of their predecessors. The public domain is the reservoir for the raw material that authors and inventors use to create new writings and discoveries.[32] The enrichment of the public domain is not a by-product of the "limited times" restriction but its purpose — it is the means that the Framers chose to ensure that our copyright and patent system would promote the progress of Science and useful Arts.[33]

The Framers' understanding of the need for limited terms had been shaped by the disastrous English experience with perpetual copyright. The Stationers' copyright, granted by the Tudor monarchs to the stationer's publishing cartel, functioned to suppress both dissent and competition.[34] The censorship and anticompetitive effects of the Stationers' copyright had led the English Parliament to abolish perpetual copyright and enact in its place a limited, fourteen year exclusive right to print and publish books, subject to a single fourteen year renewal if the author survived the expiration of the initial term.[35] The first U.S. copyright statute adopted the same

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[32] See David Lange, *Recognizing the Public Domain*, 44 L. & Contemp. Probs. 147 (1981).

[33] See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 428 (1984); L. Ray Patterson & Stanley Lindberg, *The Nature of Copyright: A Law of Users' Rights* 47-55 (1991).

[34] See Lyman Ray Patterson, *Copyright in Historical Perspective* 28-142 (1968).

[35] The influence of the English experience with the Stationers' copyright on the Framers' design of the Copyright and Patent Clause has been explored by a number of legal scholars. See Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 Wayne. L. Rev. 1119 (1983); Paul J. Heald & Suzanna Sherry, *Implied Limits on The Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119, 1144-50; Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. Intell. Prop. L. 1, 9-16 (1997); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1, 19-36 (1987); Pamela Samuelson,

duration provision.[36]

The "limited Times" restriction is even more important today than it was in 1790, when Congress enacted the first copyright statute. Until 1976, the vast majority of potentially copyrightable works entered the public domain upon publication, because the law required authors to affirmatively claim copyright protection by affixing copyright notice to publicly distributed copies.[37] Of the minority of potentially copyrightable works that gained copyright protection through publication with notice, most entered the public domain at the expiration of the 28-year initial term, because the author failed to apply for copyright renewal. A 1960 Copyright Office study concluded that only 15% of registered works due to enter the public domain were renewed.[38]

In the years since 1976, Congress has amended the copyright law to remove most of the conditions and requirements that limited copyright protection.[39] Today, after several amendments, copyright is completely automatic, vesting in all eligible works at the moment of

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Copyright, Commodification, and Censorship: Past as Prologue – But to What Future?, in The Commodification of Information 63 (Neil Netanel and Niva Elkin-Koren eds., forthcoming 2002).

[36] See An Act for the Encouragement of Learning, § 1, 1 Stat. 124 (1790); Tyler Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyr. Soc'y 19, 29-30 (2002).

[37] See Copyright Act of March 4, 1909, § 9, 35 Stat. 1075, *repealed by* Pub.L. No. 94-553, 90 Stat. 2541 (1976).

[38] See Barbara Ringer, *Study Number 31: Renewal of Copyright* 187 (1960), *reprinted in* Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess., Copyright Law Revision (Comm. Print 1960).

[39] See 1976 Copyright Act § 302, Pub.L. No. 94-553, 90 Stat. 2541 (1976); Berne Convention Implementation Act §7, 102 Stat. 2853 (1988); Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 264 (codified as amended in 17 U.S.C. § 304) .

creation and continuing until 70 years after the author's death.[40] Neither publication nor notice of copyright is required. Works protected under the old system are still in theory subject to a renewal condition, but renewal vests automatically. The copyright owner need take no affirmative steps to renew.[41] Today, essentially everything that is eligible for copyright is protected by copyright. The limited term of copyright is the only remaining device for enriching the public domain.

The limited term, though, has been getting less limited. In 1976, after a series of interim extensions, Congress gave works with subsisting copyrights the benefit of a nineteen-year addition to their copyright term. In 1998, Congress enacted the CTEA, adding a 20-year term extension to all works, including the same works it had previously prevented – by prior term extension and automatic renewal – from entering the public domain. In the words of Professor Peter Jaszi, these repeated extensions resemble "perpetual copyright on the installment plan."[42]

The public domain, moreover, is under attack on another front. In the years since the first copyright statute, we have seen a remarkable expansion in both the works entitled to copyright and the breadth of the exclusive rights included in the grant.[43] In the early years of U.S. copyright law, copyright encompassed only a limited set of uses of copyrighted works. Copyright owners had no rights to prohibit or license translations, abridgements, performances or displays; those belonged to the public

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[40] See 17 U.S.C. §§ 201, 302.

[41] See 17 U.S.C. § 304.

[42] *1995 Senate Hearing* at 72 (testimony of Peter A. Jaszi, Washington College of Law).

[43] See David Lange, *Recognizing the Public Domain*, 44 L. & Contemp. Probs. 147 (1981).

even during the copyright term.[44] Today, those uses are firmly at the core of the copyright owners' exclusive rights. The recent expansion in the subject matter and scope of copyright has made the copyright grant more costly to the public, and has made the "limited Times" restriction even more important.[45]

B. THE EXTENSION OF THE TERMS OF EXISTING COPYRIGHTS EXCEEDS CONGRESS'S POWER UNDER THE COPYRIGHT AND PATENT CLAUSE

The CTEA's extension of existing copyrights oversteps Congress's power under the Copyright and Patent Clause. It does not plausibly promote "Progress of Science and useful Arts," and it violates the "limited Times" restriction.

1. The Extension Does Not Encourage The Creation Of New Works Of Authorship.

As the Court made clear in *Graham v. John Deere*, Congress may not enlarge the monopolies it creates under the Copyright and Patent Clause unless doing so will promote "[i]nnovation, advancement, and things which add to the sum of useful knowledge." But respondent has not claimed, as it could not, that Congress's purpose in extending extant copyrights was to encourage authorship retroactively.[46] The works covered by those copyrights

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[44] See, e.g, *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1, 53-63 (1987).

[45] See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. Rev. 1180, 1195-96 (1970); L. Ray Patterson, *Copyright in the New Millennium: Resolving the Conflict between Property Rights and Political Rights*, 62 Ohio St. L.J. 703 (2001).

[46] See Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119, 1169.

were created long ago. One cannot reach back into the past and persuade their authors to have created them.[47]

2. The CTEA Does Not Harmonize U.S. Copyright Terms With Europe's And, In Fact, Heightens The Disparity Between Some Copyright Terms.

Respondent has characterized the Copyright Term Extension Act as a statute that matches U.S. copyright terms to the copyright terms prescribed by the European Union. See *Eldred v. Reno*, 239 F.3d 372, 379 (D.C. Cir. 2001). The benefits to copyright owners of a uniform term throughout the global marketplace are said to justify extending the copyright term. That assertion is difficult to defend: "The desire to cooperate with the international community may be a worthy goal, but it is not a blanket justification for passing otherwise unconstitutional legislation." Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119, 1171. This case does not, however, require decision of that question, since the Copyright Term Extension Act was not designed to, and does not, achieve harmonization of copyright terms with Europe.

United States copyright law measures copyright duration in two ways. Since 1978, works authored by identified natural persons receive a copyright term based on the life of the author. Until the enactment of the CTEA, that term was life of the author plus 50 years; today it is life of the author plus 70 years. 17 U.S.C. § 302(a). Works made for hire, and anonymous and pseudonymous works, receive a copyright term calculated from the date of the

[47] See Dennis S. Karjala, *The Term of Copyright, in* Laura N. Gasaway, *Growing Pains: Adapting Copyright for Libraries, Education and Society* 33, 50 (1997).

work's creation or first publication.[48] Before the enactment of the CTEA, that term was 100 years from creation or 75 years from publication. Today, it is 120 years from creation or 95 years from publication. 17 U.S.C. § 302(c).

The CTEA also extended the copyright term for works that were protected by federal copyright laws before the effective date of the 1976 Copyright Act. Before 1976, those works had received a 28-year copyright term that could be renewed for an additional 28 years. In 1976, Congress granted a 19-year extension, and in 1992, Congress made renewal of the copyright term automatic. Thus, before the CTEA, works published or registered before 1978 had a copyright term of 75 years. The CTEA lengthened their term further, to 95 years. 17 U.S.C. § 304.

In the European Union, works authored by identified natural persons receive a copyright term of life plus 70 years. *Council Directive 93/98/EEC* at Art. 1(1).[49] Few EU nations apply the work for hire doctrine (under which the employer of the natural person who creates a work of authorship is deemed to be the author of the work, see 17 U.S.C. § 201(b)), but the EU Directive does recognize works for which the copyright is owned by legal persons rather than authors. For those works, and for anonymous and pseudonymous works, the copyright term is set at 70 years after the work is first made available to the public. *Council Directive 93/98/EEC* at Art. 1(3), Art 1(4).[50]

[48] The Copyright Office does not keep current statistics on the percentage of registrations that are for works made for hire. As of 1955, works made for hire accounted for 40% of copyright registrations. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 n.4 (1989).

[49] See, e.g., Irish Copyright and Related Rights Act 2000, ch 3, §24(1); Netherlands Copyright Act 1912 art. 37(1).

[50] The European concept of making a work available to the public is broader than publication under U.S. copyright. A work may be widely available but still remain unpublished under U.S. law. See,

Thus, before Congress enacted the CTEA, U.S. terms calculated on the basis of the life of the author were 20 years shorter than their European counterparts, while U.S. terms for works made for hire and anonymous and pseudonymous works were *already* at least five and as much as 30 years longer than their European counterparts. The CTEA *increased* the disparity between U.S. and EU terms, for the latter category of works, to at least 25 and as much as 50 years. Thus, while sections 102(b)(1) & (2) of the CTEA could be said to promote harmonization, sections 102(b)(3), (4) & (5) were antithetical to it.[51]

In some instances, the CTEA extended U.S. copyright terms that were simply incommensurable with their European counterparts. For works authored by identified natural persons before 1976, the U.S. measures the copyright by the age of the work, while Europe measures it by the life of the author. As the example of H.G. Wells's novels demonstrates, works created and published early in an author's life expired earlier under the U.S. system, while works published late in the author's life might enter the public domain later than in Europe. Instead of revising the fixed 75-year term to match the EU term of life plus 70 for works authored by natural persons and 70 years for works made for hire, Congress simply added an additional 20 years to all copyright terms.[52]

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e.g., *Estate of Martin Luther King Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999); *Academy of Motion Picture Arts & Sciences v. Creative House Promotions Inc.*, 944 F.2d 1446 (9th Cir. 1991).

[51] Sections 102(c) and (d) were antithetical to harmonization in the same way, insofar as they applied to works made for hire and anonymous and pseudonymous works; there as well, the CTEA extended copyrights that were already longer than in the EU.

[52] Similarly, under the EU Directive, sound recordings are protected for a term of 50 years. *Council Directive 93/98/EEC*, at Art. 3(2). The copyright term for motion pictures is based on the lives of its principal creative contributors. *Id.* at Art. 2(2); see, e.g., Netherlands Copyright Act 1912, at Art. 40. Before and after the CTEA, there is little relationship between U.S. and EU copyright terms for sound recordings, typically measured by the life of the author in the U.S. and by a flat term of years in the E.U. and for motion pictures, typically measured by a term of years in the U.S. and by the authors' lives in the EU.

None of the supposed benefits of harmonizing copyright terms flow from those amendments: an author's works will still enter the public domain at different times in different jurisdictions. The only effect of these amendments is to give a windfall to current proprietors of works first published or registered during the 55 years between 1923 and 1978, and to put off for another 20 years the already-delayed entry of those works into the public domain.[53]

The failure of the CTEA to promote genuine harmonization of copyright terms should not be surprising. The primary purpose of the extension act was not harmonization, but to prevent works from entering the public domain. Congress amended copyright terms to match the terms prescribed by the European Union where doing so would increase the copyright term, and delay for 20 years the works' entry into the public domain. In cases in which the U.S. term already significantly exceeded the term granted in Europe, Congress extended the U.S. copyright terms further, in order to postpone the entry of those works into the public domain, despite the fact that doing so would *increase* the disparity between U.S. and European terms.

3. *The CTEA Is Not Justified By An Increase In The Commercial Life Of Copyrighted Works.*

Witnesses and members of Congress suggested that the fact that works of authorship now enjoyed a longer

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[53] See William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 Notre Dame L. Rev. 907 (1997).

commercial life obliged Congress to extend the copyright term to enable copyright owners to continue to earn money from the exploitation of their parents', grandparents', or employees' works for as long as such exploitation remained profitable.[54] This implies that the public domain is intended to be a repository for only those works that are no longer marketable. Under that rationale, the symphonies of Ludwig Van Beethoven (1770-1827) would be protected indefinitely. The basis for restricting copyright terms to "limited Times" is to enable broad public availability while the work is still valuable.

Moreover, the expiration of copyright does not prevent authors from continuing to develop and exploit their creations; it simply allows the public unrestricted access on an equal footing. Copyright owners who control works that remain profitable many years after they were created will, even after the works enter the public domain, continue to exercise control over and to earn revenue from any derivative works created after the initial work. See 17 U.S.C. § 103(b). When the copyright in the 1928 film *Steamboat Willie*, the first motion picture featuring Mickey Mouse, expires, the original black and white cartoon of Mickey Mouse will enter the public domain. Disney will continue to control and earn revenue from more recent renditions of Mickey, along with hundreds of works based on Mickey Mouse created in the years since *Steamboat Willie* appeared. Each of those works is copyrightable in its own right. Disney's revisions, adaptations, and elaborations of the character will continue to enjoy copyright protection until the copyrights in the derivative

[54] See *1995 Senate Hearing* at 18 (testimony of Marybeth Peters, Register of Copyrights); *id.* at 59-62 (statement of Ellen Donaldson, daughter of composer Walter Donaldson); *1995 House Hearing* at 272 (statement of Mary Ellin Barrett, daughter of composer Irving Berlin).

works expire,[55] just as Disney enjoys copyright protection for its many adaptations of other public domain works.[56]

Even if the growth in the commercial life of copyrighted works were an adequate justification for a prospective extension, it would still fail to support a retrospective one. Congress's overriding purpose in enacting the CTEA was to prevent works from entering the public domain, extending the period in which copyright holders would collect royalties. But this wealth transfer to copyright holders from the public at large brought with it none of the countervailing benefits required by the Copyright and Patent Clause.[57] By attempting to ensure that authors' grandchildren could wring every last drop of commercial value remaining in a work before it enters the public domain, Congress violated the bargain implicit in Art 1, § 8, cl. 8.

II. THE COPYRIGHT TERM EXTENSION ACT VIOLATES THE FIRST AMENDMENT

In addition to overstepping Congress's power under the Copyright and Patent Clause, the CTEA is unconstitutional for a second, independent reason: It violates the First Amendment.

A. COPYRIGHT LAWS RESTRICT SPEECH

[55] In addition, courts have held that rights under the Lanham Trademark Protection Act, 15 U.S.C. §§ 1051-1127, survive the expiration of a copyright or patent. See, e.g., *Frederick Warne & Co. v. Book Sales, Inc.*, 481 F. Supp. 1191 (S.D.N.Y. 1979) (copyright); *In re Worlds Finest Chocolate, Inc.*, 474 F.2d 1012 (C.C.P.A. 1973) (design patent). See generally Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. Miami Ent. & Sports L. Rev. 429 (1994).

[56] See, e.g., *Alice in Wonderland* (1951); *The Hunchback of Notre Dame* (1996); *Snow White and the Seven Dwarfs* (1937).

[57] See Richard Epstein, *Congress's Copyright Giveaway*, Wall Street Journal, Dec. 21, 1998, at A19.

Copyright laws impose restrictions on speech, and thus implicate the First Amendment. The essence of a copyright statute, after all, is to make it actionable to publish certain speech. If a court finds that the language of a newspaper article infringes the language of some other literary work, then it can enjoin the author from further publication, or order her to pay statutory damages flowing from the publication. Copyright gives the government authority to seize books and newspapers and the machines used to publish them; if a jury finds by a preponderance of the evidence that books are infringing, the court can order them destroyed. It is difficult to imagine a more stark restraint on speech. "Whenever the law permits the sheriff to walk into people's offices and confiscate their publications, or levy against their belongings because of something they said or how they said it, the First Amendment is deeply implicated."[58]

This is not a new idea. It is the thesis of the foundational article on the relationship between copyright and the First Amendment: Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. Rev. 1180 (1970).[59]

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[58] Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 Berkeley Tech. L.J. 535, 553 (2000); see also, e.g., Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 Stan. L. Rev. 1 (2001); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L.J. 2431 (1998).

[59] The Nimmer article provided the initial basis for the Court's case law on copyright and the First Amendment. *See* Neil Netanel, *Locating Copyright in the First Amendment Skein*, 54 Stan. L. Rev. 1, 10-11 (2001). The Court first cited it in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 n.13 (1977), and numerous courts followed suit. In *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), the Court approved the "definitional balance" approach the article originated, and cited Nimmer's treatise, which in turn cited and relied on his earlier article. See *id.* at 556; cf. *id.* at 548, 549, 551, 552, 554, 556, 560, 562, 563, 564, 566, 567, 568 (citing the treatise for various points).

Nimmer's article noted that the copyright statute, by punishing expression, "fl[ies] directly in the face" of the First Amendment. *Id.* at 1181. Nimmer urged, though, that a court could strike a balance between the government interests promoted by copyright, and the speech interests it impinged on, through "definitional balancing" such as that the Court used in the libel context in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See 17 UCLA L. Rev. at 1184. In general, he continued, a rule that copyright could extend to expression but not to ideas represented an acceptable definitional balance. "In some degree it encroaches upon freedom of speech . . . but this is justified by the greater public good in the copyright encouragement of creative works." *Id.* at 1192.

However, Nimmer explained, copyright even in expression will not necessarily have adequate First Amendment justification. In particular, he stressed, the First Amendment bars an inappropriately long copyright term – as the copyright term lengthens into perpetuity, the incremental incentive it provides vanishes, so there is nothing on the copyright side of the First Amendment balance. *Id.* at 1193. Similarly, should Congress seek to extend the copyright term for already existing works, the extension serves no interest that could be balanced against the speech interest it disserves. *Id.* at 1195.

A broad consensus of legal scholars, over the years, has adhered to the view that copyright law, as a restriction on speech, is subject to First Amendment constraints.[60]

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[60] See, e.g., Floyd Abrams, *First Amendment and Copyright*, 35 J. Copr. Soc'y 1 (1987); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 Vand. L. Rev. 891 (2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354 (1999); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*,

Nevertheless, the D.C. Circuit stated that copyright is "categorically immune" from First Amendment scrutiny. None of the court's purported or possible justifications for that far-reaching statement hold up to analysis.

1. *Harper & Row Did Not Hold That Copyright Laws Are Immune From First Amendment Scrutiny.*

The D.C. Circuit insisted that this Court's decision

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28 Conn. L. Rev. 981 (1996); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 Calif. L. Rev. 283 (1979); Gary L. Francione, *Facing The Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. Pa. L. Rev. 519 (1986); Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on The Internet*, 16 Cardozo Arts & Ent. L.J. 1 (1998); Charles C. Goetsch, *Parody as Free Speech--The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. New Eng. L. Rev. 39 (1980); Paul Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983 (1970); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1998); Michael J. Madison, *Complexity and Copyright in Contradiction*, 18 Cardozo Arts & Ent. L.J. 125, 159-73 (2000); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1 (2001); Hon. James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 Hofstra L. Rev. 983 (1990); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1 (1987); David E. Shipley, *Conflicts Between Copyright and the First Amendment After Harper & Row, Publishers v. Nation Enterprises*, 1986 BYU L. Rev. 983 (1986); Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 Berkeley Tech. L.J. 777 (2000); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. Rev. 1 (2000); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L.J. 2431 (1998); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 Emory L.J. 393 (1989); Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 Cardozo Arts & Ent. L.J. 79 (1996); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 Wm. & Mary L. Rev. 665, 666 (1992).

in *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), forbade any First Amendment scrutiny of copyright law provisions. *Eldred v. Reno*, 239 F.3d at 375. But *Harper & Row* did not say that. The Court in *Harper & Row* noted that copyright serves important public goals that enrich the system of freedom of expression. It is "the engine of free expression": by enhancing the economic incentives for authorship, it stimulates the creation of useful works and thus serves the general public good. 471 U.S. at 558. The Court rejected a claim that the First Amendment forbade copyright liability for publishing a particular article of great public interest, finding that the First Amendment was implicated but not overthrown: Defendant's constitutional claim failed in light of "the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use." *Id.* at 560.

The Court's decision in *Harper & Row* sends a crucial message: The mere fact that copyright statutes *implicate* the First Amendment does not mean that they *violate* the First Amendment. As a general matter, a statute implicating free-speech rights will be upheld if it is sufficiently narrowly tailored to advance sufficiently important government interests. Most copyright legislation advances the important government interest in providing incentives for creation, and should be upheld where it is adequately narrowly tailored to those goals. Notwithstanding defendant's claim in *Harper & Row* that its infringement enabled its publication of material of great public interest, the Court deemed the copyright statute before it to be sufficiently closely tailored to withstand defendant's First Amendment attack.

The most important reason copyright law and the First Amendment have coexisted for two centuries with

only infrequent clashes is that copyright rights are limited both in scope and in time. A significant increase in either the scope or duration of copyright necessarily implicates the First Amendment balance. For this reason, the Court's opinion in *Harper & Row* should be read cautiously. One of the most troubling aspects of copyright in recent years is that the limitations on copyright liability, including the idea-expression distinction and fair use, have been steadily shrinking via judicial construction; at the same time, copyright owners' exclusive rights have been growing.[61] Nothing in *Harper & Row* approves new copyright law that, by virtue of legislative amendment and judicial reinterpretation, is substantially less speech-protective than the copyright law before the Court in that case.

The lasting lesson of *Harper & Row*, on the contrary, is that the First Amendment is relevant to copyright law.[62] When a court hears a First Amendment challenge to copyright legislation, it must satisfy itself that the statute is sufficiently narrowly tailored to withstand constitutional attack.

2. *The Idea/Expression Distinction Does Not Immunize Copyright From First Amendment Scrutiny.*

The D.C. Circuit urged that regulation of

[61] See Jessica Litman, *Digital Copyright* 77-88, 175-176 (2001); Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 Stan. L. Rev. 1, 12-30 (2001; Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 Berkeley Tech. L.J. 777 (2000).

[62] The First Amendment has been held to limit government enforcement of a wide range of private rights, even where the laws creating those rights – like copyright – have internal limits that help protect First Amendment values. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514 (2000); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964). See generally Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 Stan. L. Rev. 1, 4 (2001).

expression raises no First Amendment concerns so long as the law allows the free communication of *ideas:* the copyist can express his thoughts in a different, non-infringing form. This is a fundamental misconception. While the Court held in *Harper & Row* that the idea/expression distinction helps copyright statutes *survive* First Amendment scrutiny, it does not follow that copyright statutes are not *subject* to First Amendment scrutiny. On the contrary, under black-letter First Amendment law, even where a speech restriction leaves people free to convey their ideas in another manner, its restriction of expression must nonetheless be narrowly tailored to important government interests. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (subjecting to First Amendment analysis a regulation limiting the loudness of music at public concerts). The Court has made clear that freedom of speech implicates the ability to choose one's words as well as one's ideas. See *Cohen v. California*, 403 U.S. 15 (1971) (rejecting the state's contention that it could forbid Cohen to wear a jacket emblazoned "Fuck the Draft" because he could convey the same idea using other words). [63]

3. *Characterizing Copyright As A Property-Rights Regime Does Not Immunize It From First Amendment Scrutiny.*

[63] See also *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 570 (1995) ("Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication.").

Copyright's bar, it is important to note, goes far beyond literal copying; it covers translations, fictionalizations, and "any other form in which a work may be recast, transformed, or adapted." See 17 U.S.C. §§ 101 (definition of derivative work), 106(2); see Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 Berkeley Tech. L.J. 777 (2000). One cannot seriously argue that such a bar to speech has no impact on First Amendment concerns.

Finally, one court has suggested that the First Amendment is irrelevant to copyright because copyright merely vindicates property rights.[64] This is incorrect as well. Enforcement of property rights *in land*, to be sure, does not raise substantial First Amendment concerns. A speaker does not have a legal right to commandeer the printing presses of the *Washington Post* for her own expression. The reason is that the laws of real and tangible personal property are neutral laws of general applicability, unrelated to speech and with only incidental effects on it. "[T]he First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[65] The Court has repeatedly so held in the context of laws that regulate a broad swath of activity and encompass speech only incidentally.

But that principle does not apply when a law -- even one with goals unrelated to the suppression of speech -- regulates speech in particular. The copyright statute is such a law. It regulates speech and speech alone. The rights it announces have no general applicability. They are property rights *in speech*. In *Turner Broadcasting System v. FCC*, 512 U.S. 622, 640 (1994), the government urged that rules requiring cable systems to carry broadcast channels should be seen as neutral laws with no special First Amendment applicability, mere "industry-specific antitrust legislation." The Court disagreed. Laws regulating speech and singling out particular categories of

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[64] See *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979). But see *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 29 (1st Cir. 1987).

[65] *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972); see also *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201 (1990); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws.").

speakers, it explained, cannot be seen as neutral; they always get heightened constitutional scrutiny. [66]

B. THE CTEA CANNOT SURVIVE FIRST AMENDMENT SCRUTINY

Once subjected to First Amendment scrutiny, the CTEA cannot survive. Even a content-neutral restriction of speech must further an important and factually demonstrable government interest, and must advance that interest sufficiently to justify its abridgement of expressive activity. *Turner Broadcasting v. FCC*, 512 U.S. 622, 664-65 (1994). Neither the CTEA's extension of copyrights in existing works, nor its copyright extension for works not yet created, satisfies that test.

The CTEA's extension of copyrights in existing works advances no legitimate government interest. The government, to be sure, has an important stake in providing incentives for the creation of new works. But the CTEA's extension of existing copyrights does not advance that interest. Nor do its provisions harmonize our copyright law with Europe's. The CTEA is highly valued by the beneficiaries of the additional copyright monopoly it granted for old works. It extends, both in Europe and in the U.S., the period during which they will continue to control and profit from those works. But Congress's desire to provide those entities with a naked wealth transfer cannot justify its restriction of speech.

The CTEA's extension of future copyrights is invalid as well. Congress has great discretion to determine the appropriate length of a copyright term in order to

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[66] 512 U.S. at 640-41; see also *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, 502 U.S. 105, 117 (1991); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 534 (1987) (subjecting to First Amendment scrutiny a law granting a private entity "a limited property right in the word 'Olympic'").

stimulate authorship and wide distribution of new works, while ensuring that the public gains unrestricted access to those works after a period of limited duration. Where Congress determines that the existing copyright term is inadequate, extending the duration of copyright prospectively is an appropriate response. The Court should defer to such a "predictive judgment[]" so long as it is "based on substantial evidence." 512 U.S. at 666. But the Court cannot defer to a judgment Congress never made. There is nothing in the legislative record to suggest that Congress found the pre-CTEA terms inadequate. Witnesses and members of Congress described the U.S. copyright system as extraordinarily successful.[67] Indeed, the evidence presented to Congress on the extension's incentive value demonstrated that it would be insignificant, because the discounted present value of the extended term would be negligible.[68] And the prospective extension, like the retrospective one, does not harmonize U.S. and European copyright law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[67] See *1995 Senate Hearing* at 26 (prepared statement of Bruce A. Lehman, Commissioner of Patents); testimony cited *supra* note 21.

[68] See *1995 House Hearing* at 300 (written testimony of Dennis Karjala); *id.* at 420 (remarks of Rep. Hoke); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119, 1173.

APPENDIX

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